

Response to Arguments

Applicant's arguments filed 03/10/08 have been fully considered but they are not persuasive.

After a careful examination of the Applicant's point of view, the Examiner believes that all the Applicant's representative arguments are moot because figures 14 and 15 clearly disclose a surface that articulates with a cooperating component. For example, the intervertebral implant is made of two different parts: elements 10 and 11, element 10 comprises a concave surface connected by the convex surface of element 11. In the Webster-Merriam Dictionary the meaning of the word articulates is the following: --- to unite by or as if by means of a joint; or to become united or connected by---. Therefore, the Zacouto reference reads on the claimed limitations.

However, if the Applicant's representative enters new limitations disclosing how one element move relative to the other element, the Examiner still believes that the Zacouto reference still reads on those limitations (such as the limitations of claim 18). For example, the Examiner agrees that the embodiment of Figures 14 and 15 is different than the embodiment of Figure 16. However, Figure 16 discloses a different variation of the embodiment of Figures 14 and 15 just by changing to a movable articulating joint. Figure 16 is a cross-sectional view of an embodiment similar to the embodiment of Figures 14 and 15 but the only difference is that element 11 is just extending out from the surface of element 10 (see col. 4, lines 26-27 and col. 8, lines 47-50). In the brief description of the drawings, col. 4, lines 26-27 clearly discloses another alternative form of the fixator and the fixator that figure 16 is referring is the fixator of

Figures 14 and 15. Additionally, col. 8, lines 50-61 clearly discloses that is conceivable to interpose a moving sphere between the two curved surfaces in order to create movement.

For the above reasons the Examiner believes that the Applicant's argument are moot.

Regarding the Taylor reference, the Examiner does not understand the Applicant's representative argument with respect to the Taylor reference. The Applicant's representative discloses that the surface of the dome element is not made from separate components.

First, the Examiner wants to point out that the dome and element 570 has been interpreted as the cooperating component and not the endplate.

Second, the Applicant's representative discloses in claim 1 that *the surface of the endplate is the device that is formed with separate components and not the cooperating component.*

Therefore, the Applicant's representative is **not** positively claiming a cooperating component formed with separate components. For the above reasons the Applicant's remarks are moot.

Regarding the Boyd et al reference, as previously mention above the meaning of the word articulates is the following: --- to unite by or as if by means of a joint; or to become united or connected by---. Therefore, the Examiner still believes that the Boyd et al reference still reads on the new limitations because the Examiner interpreted the surfaces of elements 18, 19, 30 and 31 as the articulating surfaces because those surfaces can be moved in unison through sliding motion when they are getting connected to each other during the installation and connection of the implant in situ. Again, the Applicant's representative has not positively

claimed the relationship between the two elements and how they move and interact between each other after the implant and all the parts are implanted.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1, 2, 5, 13-15, and 18 are rejected under 35 U.S.C. 102(e) as being anticipated by Zacouto US Patent 6,692,495 B1.

Zacouto discloses an artificial disc comprising an endplate (10) (the Examiner is interpreting the two separate fixators 10 in Fig. 14 as the endplate) having a surface (25b) with a cooperating component (see below 25 disclosed in the same embodiment shown in col. 8, lines 21-24) wherein the surface of the endplate is formed with separate components (see attachment disclosing the two separate fixators 10) that are physically configured for assembly within an intervertebral disc space (see Fig. 15; see col. 8, lines 27-50, the examiner two separate devices connect to each other when they are inserted within the intervertebral disc).

Regarding claim 2, see col. 8, lines 50-61 disclosing a bellow having a viscoelastic material.

Regarding claim 5, see the other metal alloy (see col. 4, lines 38-40).

Regarding claims 13-14, see col. 8, lines 21-61.

Regarding claim 14, the bellows are manipulated to achieve a vertebral distraction function.

Regarding claim 15, see screw rods (40) interpreting the retaining elements.

Regarding claims 18, see col. 8, lines 27-40 disclosing a first component (first fixator) connected from a right posterior route and a second component (second fixator) connected from a left posterior route and then abutting each other.

Claims 1, 7, 8, 18 and 20 are rejected under 35 U.S.C. 102(e) as being anticipated by Taylor US Pat. Pub. 2004/0254644 A1.

Taylor discloses an artificial disc comprising an endplate (511, see Figs. 17-19) having a surface that articulate with a cooperating component (see Fig. 19, see dome in element 570) wherein the surface of the endplate is formed with separate components (518) that are physically configured for assembly within an intervertebral disc space.

Line 4, has been identified as an intended use limitation because is typical of claim limitations which may not distinguish over prior art according to the principle. It has been held that the recitation that an element is “configured to” performing a function is not a positive limitation but only requires the ability to so perform..

Regarding claim 7, in Figure 17 elements 520 and 524 make the two separate components (518) press fit to the patient's vertebral body.

Regarding claim 8, see different embodiment disclosing a snap-fit engagement (see Figs. 11 and 12 and paragraph 79).

Regarding claims 18 and 20, the Examiner interpreted the endplate as element 18, see Figs. 1-4) having a surface (20 and 68) that articulate with a cooperating component (80) wherein the surface of the endplate is formed with separate components (elements 18 and 34) that are physically configured for assembly within an intervertebral disc space.

Regarding the word “situ” in claim 18, the examiner interpreted the element 34 as being assembled in situ because the wedge (34) has to be moved within the implant after the implant is completely inserted within the patient’s disc cavity.

Regarding claim 20, the examiner interpreted the second element 34 in the lower section of Figure 2 as the spacer that also is assembled in situ.

Claims 18-20 are rejected under 35 U.S.C. 102(e) as being anticipated by Boyd et al US Patent 6,468,311 B2.

Boyd et al discloses a method of implanting an artificial disc comprising the steps of providing an endplate (10) constructed from a first (12) and second components (13), installing the first component into an intervertebral disc space and installing the second component into the disc space by attaching the second component to the first component, thereby assembling the endplate in situ (see Figs. 8-12).

Regarding claim 19, see col. 6, line 66- col. 7, line 6.

Regarding claim 20, see Fig. 2 element 28.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alvin J. Stewart whose telephone number is 571-272-4760. The examiner can normally be reached on Monday-Friday 7:00AM-5:30PM(1 Friday B-week off).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott can be reached on 571-272-4754. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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Page 8

/Alvin J Stewart/
Primary Examiner, Art Unit 3774

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